BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

September 9, 2009

IN THE MATTER OF:	)	
	)	
Nebraska Public Service Commission and Kansas	)	
Corporation Commission Petition for Declaratory	)	**WC Docket No. 06-122**
Ruling or, in the Alternative, Adoption of Rule	)	
Declaring that State Universal Service Funds May	)	
Assess Nomadic VoIP Intrastate Revenues	)	

COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY

The Tennessee Regulatory Authority ("TRA") hereby files these comments with the Federal Communications Commission ("Commission") in support of the positions asserted by the Petitioners, Nebraska Public Service Commission ("NPSC") and Kansas Corporation Commission ("KCC") (collectively "State Petitioners"), and by the National Association of Regulatory Utility Commissioners ("NARUC") in the above-referenced docket.

State Petitioners ask the Commission to declare that states have not previously been, nor are currently, preempted from requiring that nomadic Voice over Internet Protocol ("VoIP") service providers contribute to state universal service funds based on the intrastate revenues of each such provider. The Commission's unequivocal and well-reasoned stance concerning this issue, as articulated in its *Amicus Curiae* brief filed with the Eighth Circuit Court of Appeals in *Vonage v. NPSC,*[1] further clarifies the intended parameters of the Commission's 2004 *Vonage*

[1] Brief for Amici Curiae United States and Federal Communications Comm. Supporting Appellants' Request for Reversal, *Vonage Holdings Corp. v. NPSC, et al.("Vonage v. NPSC")*, No. 08-1764 (8th Cir. August 5, 2008) *("Amicus Curiae")*. On May 1, 2009, the Eighth Circuit Court of Appeals in *Vonage v. NPSC* issued an Opinion affirming the District court's grant of an injunction enjoining the enforcement of NPSC's order requiring VoIP service providers to collect and remit a universal service fund surcharge for intrastate usage on the grounds that federal law preempted state law. *Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission,* 564 F.3d 900 (8th Cir. May 1, 2009).

Preemption Order.[2] Therein, the Commission reiterates that while states are preempted from imposing traditional "economic" regulation of VoIP service,[3] the Commission has not precluded states from requiring VoIP providers that benefit from such programs as universal service, telecommunications relay services, and 911 services, to financially support the continuation of those program services if such requirements are equitable and competitively neutral and do not frustrate any federal rule or policy.[4]

While the TRA is encouraged to learn that Vonage Holdings Corp. ("Vonage") no longer objects to contributing to state universal service funds,[5] a strong and clear statement affirming the dual federal and state authority to mandate that VoIP service providers provide financial support, on the basis of *inter*state and *intra*state revenues, for universal service is vital to avoid further misunderstandings. The TRA supports decisive action confirming the Petitioners' requested relief by the Commission in order to protect, stabilize, and sustain universal service for the ultimate benefit of all consumers, and to halt the unjustified and continuing competitive advantage extended to VoIP service providers that benefit from universal service and other similar programs yet remain exempt from the financial contribution requirements imposed on their competitors.

It is evident that states have begun to follow the lead of the FCC concerning social policy matters while exhibiting care not to impose traditional common carrier-like economic regulations including conditions on market entry. In fact, Tennessee already requires the assessment of an

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[2] *Vonage Holding's Corp. Pet. For Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 FCC.Rcd 22404 (2004) *("Vonage Preemption Order"), aff'd. Minnesota Public Utility Commission v. FCC,* 483 F.3d 570 (8th Cir. 2007).

[3] In its *Vonage Preemption Order,* the Commission preempts traditional "economic" regulation of VoIP by the states; thereby, prohibiting the enactment of state regulation, rules and policies for VoIP service providers that place conditions upon market entry, including certification requirements, tariffs and price lists, and specific filings and reporting requirements related thereto.

[4] *Amicus Curiae,* supra, at 14. See also, Commission's related reference cited therein, *Embarq Broadband Forbearance Order,* 22 FCC.Rcd 19478, 19481 ¶ 5 (2007).

[5] See, Notices of Ex Parte contact filed with the Commission by Vonage on August 7, 2009 and August 25, 2009, available online at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934802 and http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7020036577 .

emergency telephone service charge on VoIP providers[6] and includes VoIP providers in the definition of carriers that are capable of connecting users to public-safety answering points ("PSAPs") by dialing 911.[7] Further, the TRA has recently approved the *Telecommunications Rules Governing the Operation and Funding Mechanism for the Tennessee Relay Service*, which impose upon all providers of voice communications operating with the State, including VoIP service providers, certain fund contribution obligations to support the State's telecommunications relay service.

In proclaiming the telecommunications policy of the State of Tennessee and the charge of the TRA, the Tennessee General Assembly has mandated that competition be fostered, that regulation protect consumers and not unreasonably prejudice or disadvantage any telecommunications service provider, and that *universal service be maintained.*[8] Matters concerning the implementation of a state universal service fund remain in the forefront and the subject of meaningful review and consideration by the TRA.

The TRA agrees with the contention of NARUC that the institution of a rulemaking proceeding, as recommended by Vonage, is neither legally required nor beneficial to the advancement of policy. The Commission has the authority to rule on the issues before it based on the record presented and the discretion to issue an interpretative rule. By such action, the Commission can reasonably clarify that the mirroring of the existing federal safe harbor of 64.9 percent (64.9 %), or the inverse 35.1 percent (35.1 %) state safe harbor, complements and is consistent with the FCC's contribution rules. A rulemaking proceeding would needlessly delay the appropriate resolution of this matter to the detriment of ongoing state legislative and administrative efforts concerning the maintenance and advancement of universal service and other similarly important programs.

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[6] See Tenn. Code Ann. § 7-86-108(iv).
[7] See Tenn. Code Ann. § 7-86-103(a).
[8] Tenn. Code Ann. §§ 65-4-123 and 65-5-107 (revised 1997).

In conclusion, the TRA zealously advocates the relief requested and recommendations proposed by the Petitioners and NARUC and therefore urges the Commission to take affirmative and decisive action to grant the Petition for Declaratory Ruling in this matter. Reiteration of the sound and unambiguous position taken by the Commission in its *Amicus Curiae* brief is needed to stifle any remaining uncertainty concerning appropriate state action to retain and advance universal service and other similar programs. Finally, the Commission's avoidance of protracted and unnecessary proceedings is critical to bringing these important matters to an appropriate and expeditious resolution for the benefit of all consumers.

Respectfully submitted,

TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman

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